City Attorney Law Letter | Issue 14-03 | July 1, 2014

# C.A.L.L.

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## Officer John Mackey Receives the 2013 City Attorney Justice Award

Each year, the City Attorney's Office presents a Springdale Police Officer with the City Attorney Justice Award. The City Attorney Justice Award is given to an officer who has demonstrated good knowledge of criminal law and criminal procedure in pursuing justice for all persons. Officer John Mackey was presented with the 2013 award by Deputy City Attorney, Taylor Samples, at the Springdale Police Department annual awards ceremony on June 16, 2014.

Officer Mackey began his employment with the Springdale Police Department in February, 2011.

## Deputy City Attorney Sarah Sparkman Receives YLS Award of Excellence for 2013-2014

Sarah Sparkman received the 2013-2014 YLS Award of Excellence from the Arkansas Bar Association. This award is given to a young attorney for their outstanding service. Sarah was also selected to serve on the House of Delegates (governing body) of the Arkansas Bar Association. She has been with the City Attorney's Office since May, 2013.

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# Eighth U.S. Circuit Court of Appeals Holds that Police Committed No Constitutional Violation in Obtaining and Executing Search Warrant

**Facts Taken From the Case:** On February 25, 2007, Sandra Fagnan, mother of Monty Fagnan, called 911 to report a possible gas leak at her home in Lino Lakes, Minnesota. She and her husband, Gary, thought that the basement laundry room was the source of the leak. Monty Fagnan was living with his parents at the time, and he accompanied the first responders to the basement. While the firefighters looked for the leak in the laundry room, the two police officers at the scene, Sergeant Bragelan and Officer Noll, stayed in the basement living room, through which the firefighters had passed on the way to the laundry room. According to Sergeant Bragelan, the living room was somewhat dim, "but there was still plenty of light to see what you were doing." The police officers began to talk with Monty Fagnan about his extensive gun collection, which was displayed in upright glass cases along the living room wall next to the laundry room door. Officer Noll at one point stated that the barrels of two of the guns looked shorter than eighteen inches, the minimum possible length under Minnesota law. After seeing the guns' length, Sergeant Bragelan used his flashlight to illuminate more clearly the ends of the barrels and noticed that the barrels appeared jagged, as if they had been cut. Monty Fagnan affirmed that the guns were legal and had been

purchased from a licensed dealer. The police officers and other emergency personnel left after finding no gas leak.

Sergeant Bragelan and Officer Noll later compared their memories of Monty Fagnan's guns to those of similar guns in the police department armory. The officers submitted reports of their concerns over the lengths of the guns to city investigators, who prepared a detailed application for a search warrant of Monty Fagnan's home, which was authorized by an Anoka County Judge. While executing the search warrant, police officers seized two shotguns (whose barrels measured at 15.5 inches), a hacksaw, and a rifle. Monty Fagnan was arrested and charged with two counts of felony possession of a short-barreled shotgun.

The Minnesota trial court declined to suppress the evidence obtained from the search warrant. After trial, Fagnan was acquitted on both counts. Subsequently, Fagnan brought several claims in the United States District Court for the District of Minnesota-Minneapolis under 42 U.S.C. § 1983 against the City of Lino Lakes and eight Lino Lakes police officers in their individual capacities. The United States District Court granted the defendants' motion for summary judgment on all claims. Fagnan appealed the judgment of the district court only as to his Fourth Amendment claim against the police officers in their individual capacities to the Eighth U.S. Circuit Court of Appeals.

**Argument, Applicable Law, and Decision by the 8th U.S. Circuit Court of Appeals:** In assessing Fagnan's claim on appeal, the Eighth U.S. Circuit Court of Appeals (Court) said that the only issues to be decided on appeal are whether the search of Fagnan's house and seizure of his guns violated the Fourth Amendment, and whether the officers had probable cause to arrest Fagnan. The Court stated that when the defendants assert the defense of qualified immunity (as the officers did in this case), it evaluates whether defendants violated plaintiff's constitutional rights and whether those rights were clearly established. However, the Court said that if it concludes that no constitutional violation occurred, then its evaluation may end there.

Fagnan's first claim was that the Lino Lakes police officers violated his constitutional rights when they conducted an illegal search of his home. Despite the fact that the Fagnans consented to the Lino Lakes officers' entry into their home, and Monty Fagnan personally escorted the officers to the basement, Monty Fagnan claimed that Sergeant Bragelan and Officer Noll exceeded the scope of that consent when they stood near the laundry room and talked with him about his gun collection.

The Court held that the officers did not exceed the scope of Fagnan's consent for them to be in the basement. The Court said that the standard for measuring the scope of a person's consent under the Fourth Amendment is that of objective reasonableness, or, evaluating what the typical reasonable person would have understood by the exchange between the officer and the suspect. The Court said that in this case the officers had to walk through the basement living room to access the laundry room (the suspected location of the gas leak); the officers stayed near the laundry room door; and the sawed-off guns were located in a glass-walled cabinet adjacent to that door. The Court stated that given these facts, a typical,

reasonable person would understand the officers had permission to remain near the location of the problem that brought them to the house in the first place. The Court therefore concluded that the officers were lawfully in the basement when they saw, in plain view, the guns they suspected were unlawfully short.

Next, Fagnan argued that the search warrant was issued and executed without probable cause. The Court said probable cause demands only that the facts available to a reasonably cautious person would warrant a belief that certain items may be contraband, and a warrant application and affidavit demonstrate probable cause if they describe circumstances showing a fair probability that contraband or evidence of a crime will be found in a particular place. The Court noted that even with the dim lighting in the basement, Officer Noll and Sergeant Bragelan both saw the odd length of the guns without the aid of a flashlight, and that Fagnan admitted that he told the officers that the two shotguns were sawed off and used by sportsmen practicing for competition. Additionally, the Court said that the affidavit in support of the search warrant included several details from the officers' observations, and that the affidavit was specific as to what was sought: short barreled sawed off shotguns, any other illegally modified or altered firearms, manuals for weapon modification/alteration, tools for altering firearms, and items to show constructive possession of the above items. The Court concluded that such details adequately show that the warrant was supported by probable cause.

Finally, Fagnan claimed that the officers lacked probable cause to arrest him on state gun charges, since officers had a warrant to search the house but not to arrest him. The Court stated that probable cause to conduct a warrantless arrest exists when at the moment of arrest police have knowledge of facts and circumstances grounded in reasonably trustworthy information sufficient to warrant a belief by a prudent person that an offense has been or is being committed by the person to be arrested. The Court said that Fagnan was arrested after officers executed a valid search warrant for illegally shortened guns at the home where Fagnan was living, and during the course of the search found two shortened firearms in a display case full of Fagnan's guns and trophies. Therefore, the Court concluded that Fagnan's arrest was supported by probable cause and did not violate his Fourth Amendment rights.

For all of the above reasons, the Eighth U.S. Circuit Court of Appeals agreed with the district court that the conduct of the Lino Lakes police officers did not violate Monty Fagnan's constitutional rights, and the Court thus affirmed the district court's grant of summary judgment in favor of the Lino Lakes police officers.

**Case:** This case was decided by the United States Court of Appeals for the Eighth Circuit on March 10, 2014, and was an appeal from the United States District Court for the District of Minnesota-Minneapolis. The case citation is *Fagnan v. City of Lino Lakes*, ___ F.3d ___ (2014).

**This article prepared by Taylor Samples, Deputy City Attorney**

# Supreme Court of United States Holds that Consent to Search Home Provided by Present Co-Occupant Trumps Absent Co-Occupant's Refusal to Give Consent

**Facts Taken From the Case:** In Los Angeles, CA, in October of 2009, after observing Abel Lopez cash a check, Walter Fernandez approached Lopez and asked about the neighborhood in which he lived. Lopez told Fernandez that he was from Mexico, and Fernandez laughed and said that Lopez was in territory ruled by D.F.S., or the Drifters gang. Fernandez then pulled out a knife and pointed it at Lopez' chest. Lopez raised his hand in self-defense, and Fernandez cut Lopez on the wrist. Lopez ran from the scene and called 911, but Fernandez whistled, which led to four men emerging from a nearby building and attacking Lopez. The four men hit and kicked Lopez before taking his cell phone and wallet, which contained $400 in cash.

Police dispatch reported the incident and mentioned the possibility of gang involvement. Two Los Angeles police officers, Detective Clark and Officer Cirrito, drove to an alley frequented by members of the Drifters. A man who appeared scared walked by the officers and said, "The guy is in the apartment." The officers then saw a man run through the alley and into the building to which the man was pointing. A moment later, the officers heard sounds of screaming and fighting coming from that building.

Backup arrived, and the officers knocked on the door of the apartment where the screams had been heard. Roxanne Rojas answered the door holding a baby, and Roxanne appeared to be crying. Roxanne had a red face with a large bump on her nose. The officers also saw blood on Roxanne's shirt and hand from what appeared to be a fresh injury. Roxanne told the officers that she had been in a fight. Officer Cirrito asked if anyone else was in the apartment, and Roxanne said that her four-year-old son was the only other person present. After Officer Cirrito asked Roxanne to step out of the apartment so that he could conduct a protective sweep, Walter Fernandez appeared at the door wearing only boxer shorts. Fernandez stepped forward and said, "You don't have any right to come in here. I know my rights." Suspecting that Fernandez had assaulted Roxanne, the officers removed him from the apartment and then placed him under arrest.

About one hour after Fernandez' arrest, Detective Clark returned to the apartment and informed Roxanne that Fernandez had been arrested. Detective Clark received both oral and written consent from Roxanne to search the premises. Upon searching the apartment, police found Drifters gang paraphernalia, a butterfly knife, clothing worn by the robbery suspect, and ammunition. Roxanne's young son also showed the officers where Fernandez had hidden a sawed-off shotgun.

Walter Fernandez was charged with robbery, infliction of corporal injury on a spouse, cohabitant, or child's parent, possession of a firearm by a felon, possession of a short-barreled shotgun, and felony possession of ammunition.

Prior to trial, Fernandez moved to suppress the evidence found in the apartment. The trial court denied the motion, and Fernandez then pled no contest to the firearms and ammunition charges. Fernandez was found guilty after trial on robbery and infliction of corporal injury charges, and the court sentenced Fernandez to fourteen years in prison. The California Court of Appeal affirmed the trial court's denial of Fernandez' motion to suppress. The Court of Appeal reasoned that the motion to suppress was properly denied because Fernandez was not present at the apartment when Roxanne consented to the search.

**Argument and Decision by the Supreme Court of the United States:** Walter Fernandez appealed his case to the Supreme Court of the United States (Court). On appeal, Fernandez argued that his absence from the residence when his co-occupant, Roxanne Rojas, consented to the search of the residence, did not validate the subsequent police search of the residence since Fernandez was absent only because the police had taken him away. Additionally, Fernandez claimed that the search was invalid because Fernandez objected to the search while he was still present at the residence, and that such an objection should remain in effect until the objecting party no longer wishes to keep the police out of his home.

The Supreme Court of the United States disagreed with Fernandez and affirmed the ruling of the trial court and the California Court of Appeal. The Court said that its cases firmly establish that police officers may search jointly occupied premises if one of the occupants consents. However, the Court said that in the case of *Georgia v. Randolph*, 457 U.S. 103 (2006), it recognized a narrow exception to the aforementioned rule when it held that the consent of one occupant is insufficient when another occupant is present and objects to the search. The Court said that its opinion in *Randolph* took great pains to emphasize that the holding is limited to situations in which the objecting occupant is physically present. Therefore, the Court said that the narrow exception it enunciated in *Randolph* does not apply if the objecting co-occupant is absent when another occupant consents. The Court said that it refused to extend the rule enunciated in *Randolph* to the facts presented in this case, where consent was provided by an abused woman well after her male partner had been removed from the apartment they shared.

In the reasoning supporting its holding, the Court discussed its prior decisions involving consent to search the home in cases of joint occupants. The Court said that in the case of *U.S. v. Matlock*, 415 U.S. 164 (1974), it held that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." The Court said that it reaffirmed and extended the *Matlock* holding in the 1990 case of *Illinois v. Rodriguez*, 497 U.S. 177, where it held that the police officers warrantless entry into a home based on the consent of a person who no longer resided at the residence was nonetheless lawful since the police reasonably believed that the person who gave consent was a resident. Finally, the Court discussed its 2006 decision in the case of *Georgia v. Randolph*, 547 U.S. 103, where co-occupant Scott Randolph, who was

present at the residence, unequivocally refused consent to search his home, while co-occupant Janet Randolph, who was present at the residence, consented to the search of the home. Based on the facts as presented in *Randolph*, the Court held that Janet Randolph's consent was

**This article prepared by**
**Taylor Samples, Deputy City Attorney**

# 8th U.S. Circuit Court of Appeals Holds That Officer Lacked Probable Cause to Stop Vehicle and Evidence Should Have Been Suppressed

**Facts Taken From the Case:** On August 2, 2010, Deputy David Wintle saw Carlos Martins traveling west on Interstate 80 outside of Omaha, Nebraska. Deputy Wintle followed Martins and was initially unable to read the issuing state's name (Utah) on the license plate that was attached to Martins' vehicle. Martins made some lane changes before \exiting the interstate highway, and Deputy Wintle also exited and pulled Martins over for violating a Nebraska statute which provided that license plates "… shall be plainly visible at all times during daylight and under artificial light in the nighttime." Deputy Wintle found it unusual that Martins exited the highway where he did since that exit did not provide easy access to fuel and other customary \road-trip services and amenities. After stopping Martins' vehicle, Deputy Wintle had his drug dog sniff the exterior of Martins' vehicle, and the dog alerted at the rear and passenger side of Martins' vehicle. Deputy Wintle then conducted a full search of Martins' vehicle and found a small rubber-banded bundle of money and loose cash, a sleeping pad, two coolers that smelled of raw marijuana, and two vacuum-sealed bags of rubber-banded bundles of cash totaling $45,000.00 that was stored in a lock-box inside a factory-made storage area of the vehicle. No marijuana or other drugs were found. Deputy Wintle seized the $45,000.00 and took it back to the local sheriff's office, where the drug dog once again alerted at a locker where the money was hidden by police officers. Based on the reactions of the drug dog, Deputy Wintle's observations of Martins' behavior during the traffic stop, and the contents of Martins' vehicle, the government suspected that the $45,000.00 in cash was connected to drug trafficking. The government instituted a civil in rem forfeiture lawsuit against the cash, but Martins was not charged with any crime.

Prior to the forfeiture trial, Martins moved to suppress evidence obtained from the traffic stop. At a suppression hearing before a magistrate judge, Deputy Wintle testified that he was not able to read Martins' license plate until after he exited Interstate 80 and was stopping Martins. Based on Deputy Wintle's testimony, the magistrate judge determined that Deputy Wintle had probable cause to believe that Martins had violated the Nebraska statute requiring license plates to be plainly visible and recommended that Martins' motion to suppress be denied. The district court agreed and adopted the

recommendation of the magistrate judge.

At the subsequent bench trial, Deputy Wintle testified differently regarding his ability to read Martins' license plate. Deputy Wintle at the bench trial testified that he was able to read Martins' license plate after coming within one hundred feet of Martins' vehicle. Following the forfeiture trial, the district court ruled that the government met its burden of proving by a preponderance of the evidence that a substantial connection existed between the seized money and drug trafficking, and the district court ordered that the $45,000.00 in cash be forfeited. Martins then filed a post-trial motion for reconsideration of the district court's order denying his pretrial suppression motion, and the district court denied that motion as well. Martins then appealed the district court's decision to the Eighth U.S. Circuit Court of Appeals.

**Argument, Applicable Law, and Decision by the 8th U.S. Circuit Court of Appeals:** The Eighth U.S. Circuit Court of Appeals (Court) first set for the applicable law under the Fourth Amendment. The Court said that the Fourth Amendment protects against unreasonable searches and seizures, and that a traffic stop is a seizure under the Fourth Amendment. Additionally, the Court said that the decision to stop a vehicle is reasonable where a police officer has probable cause to believe that a traffic violation has occurred, and that any traffic violation, however minor, provides probable cause to stop a vehicle. Furthermore, the Court stated that the objective standard that governs an officer's decision to stop a vehicle protects officers who have a mistaken belief that a traffic law is being violated. However, the Court said that this objective standard cuts both ways; that is, even if it is determined after a traffic stop that a motorist was in fact violating some law, if it was not objectively reasonable for the officer to believe a violation was occurring at the time that the officer decided to make the stop, then the officer lacked probable cause to seize the driver. Therefore, the Court stated that the critical inquiry in a probable cause determination in the traffic stop context is what the stopping officer observed before pulling over a motorist, and the government bears the burden of showing that probable cause existed.

The Court held that because Deputy Wintle could read Martins' license plate from within one-hundred feet of Martins' vehicle, Deputy Wintle lacked probable cause to stop Martins' vehicle under the Nebraska statute requiring that license plates be plainly visible at all times. In its reasoning, the Court repeatedly referenced the inconsistencies in Deputy Wintle's testimony at the suppression hearing and the subsequent bench trial. The Court noted that at the suppression hearing, Deputy Wintle testified that he had to guess that Martins' vehicle had a Utah license plate, yet at the subsequent bench trial, Deputy Wintle testified that he was able to read Martins' license plate and tell which state issued the plate upon pulling within one-hundred feet of Martins' vehicle. The Court stated that Deputy Wintle's difference in testimony was material.

Furthermore in its reasoning, the Court said the question it must answer is whether an officer who can read a license plate from within one hundred feet can reasonably believe that there has been a violation of the Nebraska statute requiring license plates to be plainly visible. The Court concluded that the fact that Deputy Wintle initially could not ascertain the issuing state's name on Martins' license plate as Martins travelled ahead of him at a distance greater than one hundred feet did not give Deputy Wintle probable cause to believe that Martins was violating the Nebraska statute.

vehicle informed Officer King that he had just missed the guy that was selling all the drugs up there, and that the guy selling all the drugs was the one driving the white vehicle.

The following day while on patrol, Officer King spotted Dewitt and followed Dewitt's vehicle. Officer King made a traffic stop on Dewitt's vehicle. Dewitt had not violated any traffic laws, but Officer King wanted to inform Dewitt that he was the one the neighborhood was complaining about selling drugs. Upon approaching Dewitt's vehicle, Officer King could smell the odor of marijuana coming from Dewitt's open window. Officer King asked Dewitt if there were any drugs in the car, and Dewitt acknowledged that he had just finished smoking a blunt. Dewitt told Officer King that the blunt was in the ashtray, and while at the vehicle, Officer King saw baggies in the seat and a set of scales. Upon conducting a search of the vehicle, Officer King found three yellow baggies containing crack cocaine, pills, and marijuana.

Dewitt filed a motion to suppress evidence, and the trial court denied Dewitt's motion. The trial court found that Officer King conducted a Rule 3.1 stop on Dewitt's vehicle. Dewitt entered a conditional plea of guilty to possession of controlled substance with intent to deliver, possession of a controlled substance, possession of drug paraphernalia, and misdemeanor possession of a controlled substance. Dewitt was sentenced to sixteen years' imprisonment with an additional five years' suspended. Dewitt then appealed the trial court's ruling on his motion to suppress to the Arkansas Court of Appeals.

**Argument and Decision by the Arkansas Court of Appeals:** On appeal to the Arkansas Court of Appeals (Court), Dewitt argued that the trial court erred in denying his motion to suppress, claiming that Officer King did not have reasonable suspicion under Rule 3.1 to stop his vehicle on March 29, In setting forth the applicable law, the Court quoted Rule 3.1 as follows:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger or forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct.

Additionally, the Court said that reasonable suspicion is a suspicion that is based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural nature.

The Court held that, under the totality of the circumstances, Officer King lacked reasonable suspicion to stop Dewitt's vehicle. Therefore, the evidence should have been suppressed, and the trial court's ruling was reversed. The Court noted that at no time did Officer King state that he stopped Dewitt to ascertain who he was or to determine the lawfulness of Dewitt's conduct. Instead, Officer King stated that he knew who Dewitt

Otherwise, the Court noted, an officer could pull over a motorist just because the motorist's vehicle was a great distance in front of the officer, at a sharp angle to the officer, or positioned between the officer and sun on a bright day. The Court opined that a license plate is not a billboard. Finally, the Court said that the Eighth Circuit has had the opportunity to review other states' license plate display statutes and has never held that a plate readable from one hundred feet can be reasonably characterized as not being plainly visible.

Next, the Court addressed the question of whether Deputy Wintle had probable cause to stop Martins based on Martins' suspicious behavior. The Court stated that multiple innocent and lawful acts, when viewed in the aggregate by a trained police officer, can provide the necessary level of suspicion to justify a stop. The Court said that in this case, Deputy Wintle described his duties as a narcotics interdiction officer and testified that Martins' choice of a particular exit off of Interstate 80 raised suspicion.

The Court held that it rejected any claim by the government that Deputy Wintle had probable cause or reasonable suspicion to stop Martins for his allegedly suspicious interstate travel behavior. The Court stated that it has several times suppressed evidence obtained as a result of unconstitutional seizures occasioned by officers' suspicion when such suspicion is based solely on the fact that defendants were engaged in legal activity that merely appeared out of the ordinary. The Court said that the fact Martins drove a vehicle with non-Nebraska license plates and exited from Interstate 80 at an unlikely exit for cross-country travelers did not provide Deputy Wintle with the requisite level of suspicion to stop Martins.

In conclusion, the Eighth U.S. Circuit Court of Appeals held that the initial traffic stop violated Martins' Fourth Amendment rights, and any evidence obtained as a result of the stop should have been suppressed by the trial court. Therefore, the judgment of the district court was reversed.

**Case:** This case was decided by the United States Court of Appeals for the Eighth Circuit on April 16, 2014, and was an appeal from the United States District Court for the District of Nebraska. The case citation is *U.S. v. $45,000.00 In U.S. Currency*, ___ F.3d ___ (2014).

**This article prepared by Taylor Samples, Deputy City Attorney**

# Arkansas Court of Appeals Holds that no Reasonable Suspicion Existed to Make Traffic Stop

**Facts Taken From the Case:** On March 28, 2011, Officer Jeff King was investigating a narcotics complaint on an empty lot. Upon arrival, he noticed a number of people in the lot as well as one vehicle, a white 1988 Chevrolet Celebrity. Officer King made contact with the driver of the vehicle, Timothy Dewitt, and conducted a field interview with Dewitt for around fifteen minutes. Officer King said that he informed Dewitt and the others on the lot that there had been complaints about drug activity taking place on the lot and that "we're going to make a point to clean it up, and this was their warning." Officer King left the lot, and a few minutes later a vehicle pulled up and a person inside the

was because he obtained Dewitt's information on March 28, 2011, when he spoke with Dewitt at the lot. Furthermore, the Court said that Officer King stated that he stopped Dewitt to tell Dewitt that he was the one the neighbors had been complaining about. The Court opined that this is not the type of situation covered under Rule 3.1.

**Case:** This case was decided by the Arkansas Court of Appeals on June 4, 2014, and was an appeal from the Pulaski County Circuit Court, First Division, Honorable Leon Johnson. The case citation is *Dewitt v. State*, 2014 Ark. App. 369.

**This article prepared by**
**Taylor Samples, Deputy City Attorney**

# 8th U.S. Circuit Court of Appeals Upholds Life Conviction of Habitual Drug Offender

A Federal Court jury found Jonathan Russell Wright guilty of one count of possessing crack cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1).

On April 17, 2011, two North Little Rock patrol officers, Richard Gray and Matthew Thomas, responded to a burglar alarm at 2502 Wilshire Drive in North Little Rock, Arkansas, later identified as the residence of Jonathan Wright. The officers heard the alarm as they approached the residence and saw a flat screen television lying on its side in the carport area. The door to the residence, scarred by visible pry marks, was ajar. Immediately after entering the residence, the officers smelled the strong odor of raw marijuana.

The officers then conducted a protective sweep of the residence to ensure no suspects or victims were present. In the northwest bedroom, both officers observed two clear plastic bags containing what appeared to be marijuana in a dresser drawer opened approximately two to four inches. Gray and Thomas finished the room-by-room sweep, determined the residence was clear of all persons, and exited the residence. They reported what they had smelled and observed in the northwest bedroom to their supervisor and to narcotics investigators. Gray then accompanied Lead Narcotics Investigator James Neeley into the residence to show him the suspected marijuana.

Neeley and Investigator Mike Brooks prepared an application for a search warrant based upon their observations and those of the responding officers. Neeley and Brooks presented the warrant application to a state court judge. The judge signed the warrant at 3:04 p.m. After the judge signed the warrant but before conducting the search, Neeley ran his narcotics-detecting canine through the residence to pinpoint the location of any

controlled substances. To challenge the canine, Neeley closed the dresser drawer containing the previously observed marijuana. The canine alerted to various locations in the residence where narcotics were found, including the now closed drawer containing the marijuana.

After the canine finished its search of the residence, Neeley instructed other investigators to search the residence, assigning each a room to search. Brooks conducted the search of the northwest bedroom, and Investigator Mike Sexson conducted the search of the southeast bedroom. Brooks also was assigned the task of photographing the evidence. He took photographs of all of the evidence found inside the residence, including evidence found in the southeast bedroom. Brooks took photographs of the residence, of mail addressed to “Mr. Jonathan Wright” at the residence’s address, and, ultimately, of the drugs (marijuana and crack cocaine) and cash ($9,300) later found and seized. Because Neeley had already closed the dresser drawer containing the marijuana, no photograph was taken of the marijuana as it was in the drawer when Gray and Thomas initially observed it.

Among other items, the investigators seized the following evidence from the residence: four bags containing a total of 293.2 grams of marijuana, two bags containing a total of 1.4467 grams of crack cocaine, $5,300 found in a jacket pocket, and $4,000 found in a safe, all located in the northwest bedroom; two bags containing a total of 769.66 grams of crack cocaine found in a jacket located in the southeast bedroom closet; a Western Union receipt and other receipts with Wright’s name on them; an ADT Security Services bill issued to Wright for monitoring the security alarm; other mail addressed to Wright at the residence’s address; and a video surveillance system set up throughout the house.

The initial entry into the home was not challenged on appeal. Responding to alarms is clearly a duty of law enforcement and the clear and distinct odor of marijuana creates reasonable suspicion upon which a search warrant for a home may be obtained. Instead, the Defendant filed a motion to suppress physical evidence seized during the search of his home in which he alleged that the narcotics were not in plain view.

A peculiarity of this case is that the officers that observed the open dresser drawer subsequently closed the dresser drawer after discovering the contraband. They did this without photographing the open drawer and contraband first. The explanation was to "challenge the narcotics-detecting canine to find it." This rather obscure explanation was accepted by the Court and the motion to suppress was denied. Though the lack of a photograph and the act of altering the crime scene did not result in suppression in this case, those are not the preferred ways to proceed. Where a crime scene is to be photographically documented, a photograph of the probable cause is always the better plan. Altering the crime scene should only

take place where necessary for safety or other compelling reasons prior to issuance of a search warrant or prior to a probable cause/ exigent circumstances search. Train your canine where actual evidence is not at stake.

The large quantity of crack cocaine was held to be in constructive possession of the Defendant, despite testimony by an "ex-girlfriend" that others occupied the building. The mail all had the Defendant's name. The lease was signed by the Defendant and his sister, who testified she never lived there. Additionally, the ubiquitous "ex-girlfriend" testified that the Defendant had rearranged the furniture in that room in anticipation of a visit from his children. The latter reinforced the notion of dominion and control of that area. These factors served as the "nexus" linking the Defendant to the narcotics.

The amount of cocaine was further held to be sufficient evidence of trafficking. The more than $9,000 in cash in close proximity to the narcotics and additional testimony that the Defendant paid his rent in cash each month further corroborated the charge. Other circumstantial evidence included the surveillance and alarm systems employed to safeguard the valuable contraband. This was a case brought under Federal law. Arkansas law now requires additional factors beyond mere quantity to substantiate purpose to deliver. See generally the Public Safety Improvement Act of 2011, A.C.A. 5-64-420 et. seq.

This case also examined the application of the confrontation clause as applied to statements made by police investigators during the search of the premises. For undisclosed reasons, one investigator was not called to testify. This is not uncommon. Officers leave and become unavailable. Sometimes, the prosecution simply wants to limit the number of law enforcement witnesses to avoid alienating the jury. For whatever reason, the officer that discovered the large cache of cocaine did not testify. Another officer testified in response to Defense cross examination that he heard the now missing officer exclaim words to the effect of "Come here. We got something!" as an explanation as to why he entered the room. After a brief "*voir dire*" session, the Court held that the statement was not hearsay as it was "a statement to show its effect on the listener." The statement was non-testimonial and therefore not offered for the truth of the matter asserted.

Defendant Jonathan Russell Wright (AKA "Jay-One") was sentenced to life in prison as a habitual offender. That conviction was affirmed by the United States Court of Appeals for the Eight Circuit.

To summarize the holdings of this case:

- A “Protective Sweep” may be based on probable cause as developed by circumstances of the case. Here, response to a home alarm with corresponding physical evidence of the odor of Marijuana.

- Constructive possession is proved by evidence creating a nexus to the suspect/Defendant that he had both control and knowledge of the contraband. The evidence may be circumstantial.

- Evidence of intent to deliver can include quantities of cash in close proximity, efforts to safeguard the contraband and the amount of the substance in question.

- A statement offered in Court that merely explains the actions of an officer may be held as not hearsay.

**Case:** *United States v. Wright, 739 F.3d 1160 (8th Cir. Ark. 2014)*

**This article prepared by**
**David Phillips, Deputy City Attorney**

# Supreme Court of United States Holds That Anonymous Call-In of Possible Intoxicated Driver Provides Reasonable Suspicion to Make Investigative Traffic Stop

**Facts Taken From the Case:** On August 23, 2008, a Mendocino County 911 dispatch team for the California Highway Patrol received a call from another dispatcher in neighboring Humboldt County. The Humboldt County dispatcher relayed to Mendocino County dispatch the following anonymous tip from a 911 caller: "Showing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8-David-94925. Ran the reporting party off the roadway and was last seen approximately 5 minutes ago." The Mendocino County dispatch then broadcast that information to California Highway Patrol Officers at 3:47 p.m. A California Highway Patrol Officer heading northbound toward the reported vehicle responded to the broadcast, and the police officer passed the truck near mile marker 69 at around 4:00 p.m. At about 4:05 p.m., the police officer pulled the truck over. After smelling marijuana, police searched the truck and found 30 pounds of marijuana. The officers then arrested the driver, Lorenzo Prado Navarette, and the passenger, Jose Prado Navarette.

The Navarettes moved to suppress the evidence, and they argued that that traffic stop violated the Fourth Amendment because the officer lacked reasonable suspicion of criminal activity. The magistrate who presided over the suppression hearing and the California Superior Court disagreed with the Navarettes, and the Navarettes subsequently

pled guilty to transporting marijuana and were sentenced to ninety days in jail with three years of probation. The California Court of Appeal affirmed the decision of the lower court, reasoning that the content of the tip indicated that it came from an eyewitness victim of reckless driving, and that the officer's corroboration of the truck's description, location, and direction established that the tip was reliable enough to justify a traffic stop. Additionally, the California Court of Appeal concluded that the caller reported driving that was sufficiently dangerous to merit an investigative stop without waiting for the officer to personally observe additional reckless driving. The Navarettes then appealed the case to the Supreme Court of the United States.

**Argument and Decision by the Supreme Court of the United States:** The Supreme Court of the United States (Court) first set forth the applicable law. The Court said that the Fourth Amendment permits brief investigative stops when a police officer has a particularized and objective basis for suspecting the particular person stopped of criminal activity. Additionally, the Court stated that the reasonable suspicion needed to justify such a stop depends upon both the content of information possessed by police and its degree of reliability. Finally, the Court said that the standard takes into account the totality of the circumstances, or the whole picture, and although a mere hunch does not create reasonable suspicion, the necessary level of suspicion that is required is considerably less than proof of wrongdoing by a preponderance of the evidence, and is obviously less than that needed for probable cause.

The Supreme Court of the United States affirmed the decision of the California Court of Appeal and held that the police officer's stop of Lorenzo Prado Navarette complied with the Fourth Amendment since under the totality of the circumstances, the police officer had reasonable suspicion that the driver was intoxicated. The Court said that it has firmly rejected the claim that reasonable cause for an investigative stop can only be based on the officer's personal observations. Additionally, the Court stated that under appropriate circumstances, an anonymous tip can demonstrate sufficient indicia of reliability to provide reasonable suspicion to make an investigative stop.

In the reasoning in support of its holding, the Court discussed prior decisions that it had made in the cases of *Alabama v. White*, 496 U.S. 325 (1990), and *Florida v. J.L.*, 529 U.S. 266 (2000). The Court said that in *White*, an anonymous tipster told police that a woman would drive from a particular apartment motel in a brown Plymouth station wagon with a broken tail light, and that the woman would be transporting cocaine. The Court continued that in *White*, the officers stopped the station wagon and found cocaine in the vehicle, and officers did so after confirming innocent details. The Court in *White* concluded that the officers' corroboration of certain details made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity. Conversely, the Court said that in the *J.L.* case, it held that no reasonable suspicion arose from a bare-bones tip that a young black male in a plaid shirt standing at a bus stop was carrying a gun. In *J.L.*, the Court pointed-out that the tipster did not explain how he knew about the gun or suggest that he had any special familiarity with the suspect's affair, and

therefore police had no basis for believing that the tipster had knowledge of criminal activity. Turning its attention to the facts presented in the case before it, the Court reasoned that even assuming that the 911 call to Humboldt County dispatch was anonymous, the call bore adequate indicia of reliability for the officer to credit the caller's account. The Court noted that the caller reported being run off the road by a specific vehicle, and therefore the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. The Court said that this is in contrast to the facts presented in the *J.L.* case, where the tip provided no basis for concluding that the tipster had actually seen the gun. Furthermore, the Court also noted that there was reason to think that the 911 caller was telling the truth since police confirmed the truck's location near mile marker 69, which was approximately 19 miles south of the location reported in the 911 call, at 4:00 p.m., roughly 18 minutes after the 911 call. The Court opined that that timeline of events suggests that the caller reported the incident soon after being run off the road, and the Court said that this type of contemporaneous report has long been treated as especially reliable. Finally, the Court said that the 911 system allows law enforcement to verify important information about the caller, and the caller's use of the 911 system was another indicator of the caller's veracity.

In conclusion, the Court stated that the behavior alleged by the 911 caller, viewed from the standpoint of an objectively reasonable police officer, amounted to reasonable suspicion of drunk driving, and the stop was therefore proper. However, the Court cautioned that not all traffic infractions imply intoxication. For example, unconfirmed reports of driving without a seatbelt or slightly over the speed limit are so tenuously connected to drunk driving that a stop on those grounds alone would be constitutionally suspect.

**Note:** Since 1998, the Arkansas \Supreme Court case of *Frette v. City of Springdale*, 331 Ark. 103, has been the controlling case on the question of whether a call-in reporting bad driving provides reasonable suspicion of driving while intoxicated, and thus allows an officer to make an investigative traffic stop. In *Frette*, the Arkansas Supreme Court developed a three-prong test to determine whether the call-in provided sufficient indicia of reliability to allow an officer to make a stop based solely on the call-in. Those three factors as enumerated by the Court in *Frette* are: (1) whether the informant was exposed to possible criminal or civil prosecution if the report is false (which is satisfied if the caller gives his or her name to authorities); (2) whether the report is based on the personal observations of the informant; and (3) whether the officer's personal observations corroborated the informant's observations. Thus, under the factors enumerated in *Frette*, it has been the opinion of this office that the first prong of *Frette* is not satisfied with an anonymous call, and therefore an anonymous call of possible intoxicated driving alone would not have provided an officer with reasonable suspicion to stop the vehicle.

The opinion of the Supreme Court of the United States in *Navarette et al. v. California* appears to have greatly reduced the burden on law enforcement by holding that an anonymous call-in of potential intoxicated driving can provide reasonable suspicion to stop the vehicle. Personal observations of the police officer always provides the best probable cause or reasonable suspicion to make a traffic stop. It is the opinion of this

office that if at all possible when making a stop based on a call-in alone, Springdale Police Officers and Springdale dispatch should still obtain the name of the caller. However, the Springdale Police Department should be aware of the holding of the United States Supreme Court in *Navarette et al. v. California*, which as stated previously, appears to greatly lessen the burden of law enforcement by providing that an anonymous call-in of an intoxicated driver can provided reasonable suspicion to make a traffic stop.

**Case:** This case was decided by the Supreme Court of the United States on April 22, 2014, and was an appeal from the Court of Appeal of California, First Appellate District. The case citation is *Navarette et al. v. California*, 572 U.S. _____ (2014).

**This article prepared by**
**Taylor Samples, Deputy City Attorney**

# The City Fireworks Ordinance: A Refresher

Every year about this time, people start asking questions regarding the city's fireworks ordinance. Most of these people will rely on what advice is given to them by the Police Department. In addition, the Police Department inevitably receives a substantial number of calls regarding fireworks issues in the city from the end of June through the first part of July of any year. To assist in answering these questions and responding to these calls, a review of the City's fireworks ordinance is helpful. This review will also ensure that the ordinance is properly enforced. The primary City ordinance on fireworks is found at Section 46-56 of the Code of Ordinances for the City of Springdale.

<u>Selling Fireworks - Section 46-56(a)</u>

Prior to 2003, the selling of fireworks within the city limits was strictly prohibited by ordinance. However, in 2003, the Springdale City Council amended the fireworks ordinance to allow the selling of fireworks within the city limits. Now, in order to sell fireworks in the City, a permit to sell fireworks must be obtained from the City Clerk. Before a location can obtain a permit to sell fireworks, certain requirements must be met. Then, once a permit has been issued, the ordinance places several restrictions on the selling of fireworks within the city limits. Specifically:

-No fireworks shall be sold or stored within a permanent structure of the city.

-No fireworks stand shall be located except in a C-2, C-5, or A-1 zone, provided the A-1 property has frontage on a federal or state highway.

-Fireworks may only be sold between June 28th and July 5th.

-All locations where fireworks are sold must comply with all fire codes and must be inspected by the fire marshal prior to the sale

of fireworks.

-No person selling fireworks within the city shall be allowed to sell any fireworks which travels on a stick, as these are prohibited to be discharged within the city.

-No fireworks stand shall be located within 250 feet of a fuel dispensing facility.

-All fireworks stands must have at least a 50 foot setback from the street/highway.

-No person under the age of 16 shall be allowed to purchase fireworks in the city.

-All locations where fireworks are sold within the city shall post a sign, visible to the public, which states, "The discharge of bottle rockets or fireworks that travel on a stick are prohibited in the City of Springdale."

Prohibited Fireworks – Section 46-56 (b)

It is a violation of the City's fireworks ordinance for anyone to discharge (or sell) bottle rockets within the city limits of Springdale, even during the time when other fireworks are allowed to be discharged. However, the mere possession of bottle rockets is not prohibited.

Permitted Locations/Times – Section 46-56 (c)

Section (c) of the ordinance sets forth when legal fireworks may be discharged within the city limits. The ordinance provides that **legal fireworks may be discharged on private property between the hours of 8:00 a.m. and 10:00 p.m. beginning on July 1st and ending on July 4th.** Therefore, anyone discharging fireworks after 10:00 p.m. on the night of the 4th would be in violation of the City's fireworks ordinance.

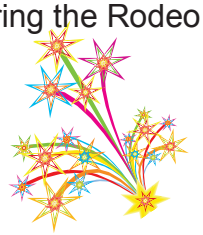
To be in compliance with the ordinance, the owner of the private property where the fireworks are being discharged must consent to this activity. Furthermore, the ordinance requires that all persons under the age of 16 who are participating in the discharge of fireworks must be supervised by a person of at least 21 years of age.

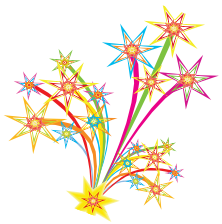
The City also has an ordinance which prohibits fireworks in a city park, unless the person has obtained written approval from the park director.

Public Display of Fireworks

Section (b)(2) of the ordinance sets forth the requirements for obtaining a permit for a public display of fireworks. The city may issue permits for a public display of fireworks if certain requirements are met. Once a permit is issued, any such public display shall be conducted by a competent operator approved by the fire chief and shall be located and discharged in such a manner as to not be hazardous to any property or dangerous to any person. In addition, **a person or entity may discharge fireworks pursuant to a permit for the public display of fireworks only between the hours of 8:00 a.m. and 11:00 p.m. from July 1st through July 4th of any year**. There are three situations when the city may issue a permit to allow a public display of fireworks on a day not falling between July 1st and July 4th of any year. *First*, the city can issue a permit for a public display of fireworks at a professional sporting event in a P-1 zone between the hours of 6:00 p.m. and 11:00 p.m. from April 1st through September 30th of any year, provided that the

property adjacent to the P-1 zone is commercial or agricultural. *Second*, the city can issue a permit for a public display of fireworks for the purpose of allowing small test firing to determine the feasibility of a discharge site for future public display, provided no salute shells are discharged and provided that any such test firings shall occur between the hours of 6:00 p.m. and 10:00 p.m. between April 1st and June 30th of any year. *Third*, the city can issue a permit to allow the Rodeo of the Ozarks to shoot fireworks on regularly scheduled nights of the Rodeo of the Ozarks. This ordinance was passed by Springdale City Council in 2012 because the Rodeo of the Ozarks now has their first performance starting on Wednesday and ending on a Saturday, which does not always fall between July 1st – 4th date. For instance, the Rodeo of the Ozarks will be held July 4th through July 7th this year. Under the new ordinance, the Rodeo of the Ozarks can obtain a permit to shoot fireworks during the Rodeo of the Ozarks, but the fireworks still must not be discharged after 11:00 p.m.





**This article prepared by Ernest Cate**
**City Attorney**
**Reprint from July 1, 2013 *C.A.L.L.***

# U.S. Supreme Court Holds Police Must Obtain a Search Warrant Before Searching Contents of a Cell Phone Incident to Arrest

The United States Supreme Court decided *Riley v. California* on June 25. This article is a brief overview of the issues before the Court and key things to take from the case.

**Things to take away from the case**:

1. Generally, police cannot search the contents of a cell phone incident to arrest

2. Generally, police officers must get a search warrant to search the contents of a cell phone

3. Preservation of evidence and officer safety were not persuasive arguments to the court to justify a warrantless search of digital data incident to arrest.

4. There may be instances in which probable cause and exigent circumstances exist that would not require police to obtain a search warrant to search the contents of a cell phone.

**Facts**:

This decision is an appeal from two separate cases - *Riley v. California* and *United States v. Wurie.*

***Riley*:**

In *Riley*, the defendant was stopped for expired registration tags. The officer learned that the defendant had a suspended driver's license during the stop. The officer impounded the car pursuant to police policy, and another officer inventoried the car. While conducting the inventory, the officer discovered loaded firearms under the car's hood. Riley was charged with possession of concealed and loaded firearms.

An officer searched Riley incident to arrest and found a cell phone on Riley. The officer accessed information on the phone and found evidence of gang activity. At the police station after the arrest, a detective searched more of the contents of the phone to find more evidence of gang activity. Along with the gang -related evidence, the detective found photographs of Riley in front of a car that the police suspected had been in a shooting a few weeks earlier.

Riley was ultimately charged with assault with a semiautomatic firearm and attempted murder as a result of the prior shooting. The state also alleged that the shooting was for the benefit of a street gang, which brought an enhanced sentence.

Riley moved to suppress all evidence obtained from the cell phone on the grounds that the cell phone search was performed without a warrant or exigent circumstances. The court denied Riley's motion. Riley was convicted on all counts. Riley appealed to the California Court of Appeal which affirmed the trial court, the California Supreme Court de- nied Riley's petition to review, and Riley petitioned the United States Supreme Court for review.

***Wurie*:**

In *Wurie*, officers arrested Brima Wurie after one of them saw Wurie making a drug sale from a car. Officers seized two phones from Wurie at the police station. Wurie's flip phone that was seized repeatedly received calls from a contact named "my house." The police opened the phone, saw a photo of a woman, accessed the phone log, and traced the phone number they found under the "my house" contact to an apartment building.

The police went to the building, saw a mailbox with Wurie's name on it, and saw a woman in the window of an apartment who looked like the woman on the phone. The police secured the apartment and obtained a search warrant for the apartment. Inside the apartment, the police found 215 grams of crack cocaine, marijuana, paraphernalia, ammunition, a gun, and cash. Wurie was charged with distributing crack cocaine, possession with intent to distribute, and being a felon with a firearm and ammunition.

Wurie moved to suppress evidence obtained from the apartment, arguing that it was fruit of an illegal search of the contents of his cell phone. The trial court denied Wurie's motion. Wurie was convicted on all counts. Wurie appealed to the First Circuit, which reversed the trial court in a split decision. The United States Supreme Court granted review.

**Decision:**

The Supreme Court held that generally, the contents of a cell phone cannot be searched incident to arrest. In making its decision, the court considered whether the necessity of officer safety and preservation of evidence applied to searches of cell phone data.

The Court found the argument of necessity to search cell phone data for officer safety unpersuasive. The Court stated that police officers can examine the physical aspects of the phone to determine whether the phone can be used as a weapon, but that the digital data on a phone cannot itself endanger an officer. The Court contrasted the present case with Robinson, in which the Court found that officers could search the contents of a pack of cigarettes by stating "...unknown physical

objects may always pose risks, no matter how slight, during the tense atmosphere of a custodial arrest." The court stated that there are no unknowns with cell phone cell phone data that would present a physical threat.

The court also rejected the argument that a warrantless search of cell phone data is necessary to preserve evidence. Riley and Wurie conceded that an officer can seize and secure a cell phone to prevent destruction of evidence while seeking a warrant. However, the court said that "...once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone." The court held that generally, issues of loss of data such as remote wiping or digital encryption do not justify a warrantless search incident to arrest. However, there may other grounds on which officers would have justification to search the phone to preserve evidence.

The Court stated that there may be instances in which exigent circumstances exist that would allow a warrantless search of a cell phone. The Court did not make specific holdings as to when exigent circumstances exist, but did provide some guidance. The court said "circumstances suggesting that a defendant's phone will be the target of a remote-wipe attempt" may provide exigent circumstances. Furthermore, the court said that officers may be able to disable a phone's automatic lock feature to prevent the phone from automatically locking and encrypting data while obtaining a search warrant. The court also listed hypotheticals that may constitute exigent circumstances - a suspect texting an accomplice preparing to detonate a bomb or a child abductor who may have information on the child's location on the phone. However, despite leaving the possibility open to search cell phone data without a warrant when exigent circumstances exist, the court made a clear mandate on searches incident to arrest.

The Court concluded its decision by stating "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is ... simple - get a warrant."

**Citation:** This case was decided by the United States Supreme Court on June 25, 2014. The case citation is *Riley v. California*, 573 U.S. ___ (2014).

**This article written by Sarah Sparkman,**
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***This publication is intended to provide legal guidance for Springdale, Arkansas police officers. Officers reading C.A.L.L. from other jurisdictions should consult their own legal counsel for legal advice.***

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